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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 687

INDUSTRIAL SHOE MACHINERY CORP.,
PETITIONER,

v.

UNITED SHOE MACHINERY CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

Table of Contents

	Page
Petition for a Writ of Certiorari	1
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statute and Rule Involved	2
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	8
Appendix A — Opinion of the Court of Appeals	9
Appendix B — Judgment	17
Appendix C — Order of Court, August 20, 1964	18

Table of Citations

Cases

Aersol v. *Scovill*, 1964, 334 F.2d 751	7
Graver v. *Linde*, 336 U.S. 271, 69 S Ct. 535, 93 L. Ed. 672	7
Holland v. *American Steel*, 1952, 196 F. 2d, 749, cert den. 344 U.S. 855	7
Lorenz v. *General*, 1964, — F.2d —, 143 USPQ 140, 141	7
B. F. Sturtevant Co. v. *Massachusetts Hair & Felt Co.*, CA-1, 1941, 122 F.2d 900, reh den. 124 F.2d 95, cert. den. 315 US 823	7
Thermo-King v. *White's Trucking*, 1961, 292 F. 2d 668	7
United States v. *United Shoe Machinery Corp.*, DC Mass. 110 F Supp 295	5

Statutes

35 USC 103	2
35 USC 103, Rule 52a	3
28 U.S.C., Section 1254 (1)	2

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PETITION FOR A WRIT OF CERTIORARI

Industrial Shoe Machinery Corp. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on July 15, 1964.

Citations to Opinions Below

The opinion of the District Court is printed on pages 182-198 of the record appendix, and has been published at

223 F Supp 826, 140 USPQ 10. The opinion of the Court of Appeals for the First Circuit is printed in the appendix hereto, infra pages 9-16 and has been published at 335 F 2nd 577, 142 USPQ 181. The order amending the opinion is printed on page 18.

Jurisdiction

The judgment of the Court of Appeals was entered on July 15, 1964, Page 17, infra. Petitioner filed a Petition for Rehearing on July 28, 1964, which was denied on August 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented for Review

1. Is a Judge of a United States District Court competent to find a patent invalid for want of invention:
2. If a District Court, after a full trial, makes detailed findings that a patent is invalid, can a Court of Appeals reverse those findings without showing them to be clearly erroneous?
3. If a manufacturer has been adjudicated a monopoly, can a District Court consider the existence of such adjudication in evaluating the contention of the manufacturer that extensive sales show patentable invention?

Statute and Rule Involved

The statute involved in the decision of the above questions is 35 USC 103:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth

in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. (July 10, 1952)"

The rule involved in the decision of the above questions is Rule 52a:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). (As amended January 21, 1963, effective July 1, 1963)."

Statement of the Case

United Shoe Machinery Corporation, respondent, brought suit for patent infringement against Industrial Shoe Machinery Corp., petitioner, with respect to two patents (R. 7-8) [1] and later a third patent (R. 12-13) all relating to machines for forming the toe sections of shoes. Industrial filed counterclaims of unfair competition and violation of the anti-trust laws. The District Court conducted a three and one-half day trial and heard many witnesses, including two experienced patent attorneys of United, two expert engineers of United and Industrial's president who was also its engineer. The Court dismissed the counterclaims and wrote detailed findings and conclusions wherein each of the patents in suit was found to be invalid for want of invention. (R. 182-198) The District Court rendered judgment for Industrial and dismissed the complaint. (R. 198)

The Court of Appeals for the First Circuit affirmed the trial court with respect to the litigated claims of two of the three patents, but reversed the judgment with respect to U. S. Patent No. 2,926,367 and ruled it to be valid. (Pages 9-16) This present petition is directed to this latter patent, which concerns a toe-lasting machine.

In its opinion, the District Court pointed out that prior to the patent in question, toe lasting had been accomplished since as far back as World War I by LM-6 toe-lasting machines manufactured by United. (R. 184) Although it had long been recognized in the trade that the LM-6 machine requires considerable physical effort to operate, United "until it was effectively challenged by a competitor, did nothing to introduce commercially an improvement to

[1] A Record Appendix in two volumes with continuous paging was filed in the Court below. A certified copy and nine additional copies of this Appendix have been filed in this Court. References to the Appendix are designated "R".

reduce commercially an improvement to reduce the operator's physical effort". (R. 185) Contemporaneous memoranda (R. 362-400) prepared by patent attorneys of United who testified before the Court as witnesses not only gave a detailed analysis of the patent both in comparison with a competitive power toe-lasting machine and prior art power toe lasting machines, but clearly showed that United did not believe its machine to be an invention (R. 147-155, 168-170). As Judge Wyzanski put it, "On United's own testimony patent no. 2,926,367 is not a significant step in advance of the prior art . . . . United's many experiments thereafter were principally to find ways of rivalling Kamborian without being found liable for infringement. All that United did was to produce an alleged invention that hardly goes beyond a handle, a button and a lock". (R. 190)

United had asserted that its patent must be valid because it filled a long felt want and enjoyed commercial success. Although the evidence shows substantial sales* of certain machines made by United, the District Court pointed out that "no machine precisely corresponding with the claimed invention was ever marketed by United. And, in the second place, even if United succeeded in getting a large market for a new product its success is not necessarily to be attributed chiefly to the technical advance which a new product represented." (R. 190-191) The District Court took notice of its own decision in *United States* v. *United Shoe Machinery Corp.*, DC Mass., 110 F Supp 295 which held United to be a monopoly and concluded "the burden is on United to show that there is such a competitive market if United seeks to have this court use the volume of its sales as the basis for infering the originality of its products." (R. 191)

In reversing the District Court with respect to the patent

*Including leases.

in question, the Court of Appeals did not point out wherein the District Court had misconstrued any statute or doctrine of law in finding the patent invalid. Instead, ignoring the substantial evidence which the District Court had carefully noted in support of its findings, the Court of Appeals made a general attack on the competence of a District Court to judge the existence of invention. (Page 12) Examination of the opinion of the Court of Appeals does not indicate any showing that the findings of the District Court were clearly erroneous as required by Rule 52a. The Court of Appeals did make a review of the prior art patents, but in doing so, ignored United's testimony and memoranda referred to by the District Court and above, wherein these very patents were known and regarded as pertinent by United before it filed its patent application.

Further, the Court of Appeals, in its opinion as originally worded, confused the identities of Industrial and Kamborian, the latter being the competitor who stimulated United's interest in marketing power toe lasting machines. Even in its corrected form the opinion of the Court of Appeals contains serious misstatements of fact prejudicial to Industrial and wholly unsupported by the record.* The Petition for Rehearing called the attention of the Court of Appeals to these portions of the record which had been ignored, but with no success.

Reasons for Granting the Writ

1. It is important in carrying out the intent of the patent laws that the public have confidence in the courts. The action of the Court of Appeals for the First Circuit of substituting its own judgment of *validity* for the District

*The statement "That this [United's patent] was a substantial advance is shown not only by undisputed testimony, but by the evidence of commercial acceptance" (Page 13) is unsupported and

Court's clear finding of *invalidity* tends to discourage a small manufacturer from contesting the patent position of a large competitor, unless reversed.

2. The doctrine of *Graver* v. *Linde,* 336 U.S. 271, 69 S Ct. 535, 93 L ed 672, applying Rule 52a to patent cases has been followed in the Fifth and Seventh Circuits. [Fifth Circuit—*Lorenz* v. *General,* 1964, — F.2d —, 143 USPQ 140, 141; *Thermo-King* v. *White's Trucking,* 1961, 292 F.2d 668. Seventh Circuit—*Aersol* v. *Scovill,* 1964, 334 F.2d 751; *Holland* v. *American Steel,* 1952, 196 F.2d 749, cert den. 344 US 855]. However, it has been apparently ignored in the First Circuit, for here there was no showing that the District Court's finding of no invention was clearly erroneous. Review is needed to bring Rule 52a back to the First Circuit, *(B. F. Sturtevant Co.* v. *Massachusetts Hair & Felt Co.,* CA-1, 1941, 122 F.2d 900, reh den. 124 F.2d 95, cert. den. 315 US 823, held issue of patentable invention to be one of fact).

3. The Court of Appeals for the First Circuit has enunciated a new and disturbing principle of law to the effect that a judge of a United States District Court is *not* competent to decide whether a patent is invalid for want of invention. Such a basic change in our judicial system requires review.

4. It is in the public interest that this particular patent case be reviewed because of its anti-trust background. The District Court chose not to ignore what everyone knew, namely that United had been adjudicated a monopoly a few years before and was under a decree designed to encourage competition in the field of shoe machinery. The District

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contrary to that of the District Court. Further, the statement that "When appellee [Industrial] entered this area it essentially followed United rather than the prior machines" (Page 18) is an unwarranted finding. No finding at all relating in any way to this point had been made by the District Court, and in fact, Industrial had testified that its machine was a wholly original and simply the application of known principles of air engineering to the old LM-6 toe-lasting machine.

Court pointedly considered the anti-trust case in dismissing United's contention that sales of certain toe lasting machines were sufficient to prove the existence of patentable invention. It is apparent from the tenor of the decision of the Court of Appeals, however, that it frowned on the District Court's consideration of the anti-trust case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6281.

UNITED SHOE MACHINERY CORPORATION,

PLAINTIFF, APPELLANT,

v.

INDUSTRIAL SHOE MACHINERY CORPORATION,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[223 F. Supp. 826]

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

H. L. Kirkpatrick, with whom *Edgar H. Kent* and *Martin Kirkpatick* were on brief, for appellant.
Joseph Zallen for appellee.

OPINION OF THE COURT.

July 15, 1964.

ALDRICH, *Circuit Judge.* This is an action by United Shoe Machinery Corporation, United, against Industrial Shoe Machinery Corporation, Industrial, for infringement of three patents, Nos. 2,926,367; 2,986,753, and 3,061,852, relating to toe lasting machinery. The district court found all three patents invalid and, without making findings as to infringement, entered a judgment of invalidity on Industrial's counterclaim, and dismissed the complaint. United appeals.

It is sometimes preferable for a trial court to pass on infringement as well as validity, not only to enable an

appellate court to determine the action finally, but also, if lack of infringement is clear, perhaps to decide the case ultimately on this narrower issue. We make no present generalizations on this matter, but *cf. Hap Corporation* v. *Heyman Manf. Co.*, 1 Cir., 1963, 311 F.2d 839, 844, *cert. den.* 373 U.S. 903. United makes a more specialized objection with respect to the court's failure to decide questions of infringement because it invokes the principle that immediate and successful copying lends evidentiary support to the claim of validity. See *Mershon* v. *Sprague Specialties Co.*, 1 Cir., 1937, 92 F.2d 313, 316, *cert. den.* 304 U.S. 561. Again we voice no comment because, on our view, the principle is inapposite.[1] We pass directly to the issue of validity.

Toe lasting is an operation requiring a series of steps. In sum, the material which will constitute the outside of the toe, known as the upper, is placed around the toe end and over the toe lining and the marginal portion of the insole mounted on an inverted wooden last and the edges partially attached to the insole, usually by a quick-setting cement. The first step is the upwiping (the wooden last being upside down) of the material around the toe; the next is the overwiping, or inwiping, over the edge of the insole, and the final step is bedding down. Bedding down is the flattening out and fastening of the overlapped material to the insole. Normally there must also be a trimming off of the central portion of the overwipe, which bunches, and accordingly will not completely bed. As to some shoes, particularly women's with highly pointed toes or delicate uppers, the operation as a whole is far from routine. In the words of the district court,

> "the toe lasting operation requires a skilled operator who observes and feels the shoe upper on the last as

[1] Copying, like commercial success, is irrelevant except in close cases. *Cf. McCord Corp.* v. *Beacon Auto Radiator Co.*, 1 Cir., 1952, 193 F.2d 985, 989.

> he forms and tensions the upper by means of the lasting instrumentalities, such as the wipers and the toe band . . . in order that the tension or stress of the shoe upper will be evenly distributed around the toe end of the last and the upper and the lining will be smooth and free from wrinkles when the last is removed. . . . [O]n any given shoe, a skilled operator might repeat portions of the upwiping step and at least the initial portion of the overwiping step sequentially as well as alternately as his experience tells him is necessary properly to form the upper around the last. This ability is particularly important in the usual shoe factory operations in which the uppers prepared for the toe lasting operation are not as uniform as might be desired." 223 F. Supp. 826, at 828.

Patent No. 2,926,367 relates to a power-assisted toe lasting machine which sought to supplement the advantages of a manual *(i.e.,* human-powered) machine, on which an operator could exercise the "feel" necessary to do the careful work thus described, by supplying controlled power in such a way that it could reduce the expenditure of physical effort without undue interference with the operator's individual skill. The control achieved was such that the operator could engage or disengage the power at will and could hold temporarily in any position one set of wipers while he was operating, manually or otherwise, the others. A more comprehensive description of the device and its accomplishments will be found in the opinion of the district court, *supra,* at 829-31. After making these findings the court stated, "United's many experiments . . . were principally to find ways of rivalling Kamborian [an earlier Industrial machine] without being found liable for infringement. All that United did was to produce an alleged invention that hardly goes beyond a handle, a button, and a lock." It added, a matter we will return to, that evidence of com-

mercial success was not to be considered because of certain circumstances peculiar to United, and failed to comment upon Industrial's alleged copying. It concluded, "On United's own testimony, Patent 2,926,367, is not a significant step in advance of the prior art," but merely "small steps [that] could be devised by any mechanic."

In our opinion this was a considerable undercharacterization both of the testimony and of the device. A court undoubtedly may, on its own, draw the conclusion that certain advances are within the knowledge or ability of ordinary mechanics skilled in the art, but we question, in the absence of affirmative evidence enabling the court to put itself in the position of such persons, whether its own judicial competence may extend beyond a relatively narrow area. This area is well illustrated by the second patent, discussed *infra*. One may wonder, however, whether a court, unaided by any expert testimony, can find that a machine which, although of relative complexity, is claimed to be of improved simplicity, and which was produced only after several months of apparently intensive efforts and some fifteen or twenty attempted "combinations," was a matter of obviousness to "any mechanic." The changes were hardly only "a handle, a button and a lock," although if they were we might agree with United that this did not negative originality. But passing purely mechanical factors, we do not find the '367 device within the teaching of the prior art. The prior art shows manual devices, and power devices, and manual devices convertible at will to power. However, on examination it shows none of the high degree of discretion here possessed described in detail in the court's findings, *supra*.

Perhaps the best approach would be to discuss the two Pym patents referred to by the court, No. 1,678,873 (inadvertently numbered 2,098,358) and No. 1,693,119, both of which were power operated with manual control. The '873

device could be made to function either forward or in reverse, at the will of the operator, but by a single control. Its mechanically interdependent cams permitted no selection over the sequence of operations. No wiping could be performed manually. The '119 device, which employed friction clutches, and was required to be belt-driven, did permit independent control of the upwipers and the overwipers. However, like the '873 patent, it was solely power operated, and with no "hold" which permitted retention of what had been accomplished with one set of wipers while the operator went ahead or back or resumed operations with the other. Neither of these devices, which the court regarded as "foreshadowing" the '367 patent, nor any of the six others it merely referred to without discussion,[2] possessed the scope and flexibility (the ultimate objective of all power-assisted machines) of United's device. Moreover, it may be noted that none ever proved commercially acceptable.

United was the first to devise a combination machine whereby the three lasting operations could be separately performed with full discretionary, and a locking, power assist that permitted selective repetition "sequentially as well as alternatively." That this was a substantial advance is shown not only by undisputed testimony, but by the evidence of commercial acceptance.[3]

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[2] Six other patents, with largely automatic power operation, were asserted by Industrial's counsel as anticipating or teaching United's device. No witness so testified. Only one of them was listed on the '367 wrapper. In an area as identifiable as a toe laster it could not be that so many patents were inadvertently overlooked, and it seems significant in the light of this testimonial silence that the Patent Office representatives qualified in this field did not regard them as sufficiently relevant even to cite.

[3] Since we need draw no greater conclusions from this success we do not consider further the court's finding that the acceptance was not entitled to the usual weight because of special circumstances relating to United's behavior and its position in the industry. Regardless of such circumstances we do not see how United could have marketed

The court stated that United filled no long-felt want, and might have developed this device at any time, but was slothful because of its comfortable monopoly position. Even if the court was correct as to monopoly and sloth, which, on the record, is open to question, Kamborian was not slothful. Yet when he decided to enter this field he not only did not follow any of the expired patents (including the two Pyms) referred to by the court, but did not learn from them what, allegedly, they taught United. It is obvious that it was not a case of learning but deciding not to follow, because when United's device appeared Kamborian shortly launched into that area.

On this record we find valid those claims designated by United to be infringed.[4] As to infringement, the district court not having passed upon this issue we will not do so ourselves in the first instance, except to state that United's claims do not strike us as per se untenable.

The 2,986,753 patent presents a different situation. The invention here, if any, is an upwiper, sometimes called a toe band, composed of a plastic known as Teflon backed by a strip of spring steel that can be formed in a V and bent by hand to correspond roughly with the toe of the particular shoe being lasted. The Teflon is described as having a narrow operating edge, so that its cross-section shows as slightly triangular. Teflon is a firm material, but its surface has a low coefficient of friction and, accordingly, will not damage the most delicate uppers. The prior art showed wipers of plain steel, of plain Teflon, of leather and some other substances backed by steel, and of Teflon

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what was essentially these machines if they did not function advantageously. (By using the word "essentially" here we are not to be taken as invading the issue of equivalency between United's patent and the alleged infringing devices.)

[4] Claims 3, 4, 9, 10, 11, 12, 17, 18, 19, 20, 25, 26, 27, 29, 30, 31, 33 and 34. The court also found invalid claims which were not alleged by either party to be infringed or copied. We vacate that finding, also, but without making the contrary finding.

backed by steel linkage. Although the properties of Teflon were well known, and it had been used as above for perhaps a decade, no one had realized what proved to be the highly beneficial result of combining steel, which would hold a shape, with Teflon, which, unless so backed, would not. Even so, we do not believe that every previously undiscovered combination of known materials possessing known qualities should be patentable because the combination proves particularly efficient, especially if it is along lines already recognized.[5] *Cf. Lincoln Stores, Inc.* v. *Nashua Mfg. Co.*, 1 Cir., 1946, 157 F.2d 154, 162, *cert. den.* 329 U.S. 811. Nor was there invention in using a strip of Teflon of a graded thickness. There was nothing novel in the use of a slightly angular wiper, see, *e.g.*, Jorgensen Patent 2,324,509, July 20, 1943.[6] In Jorgensen this was achieved by the shape of the backer, see, *e.g.*, p. 8 of the Patent, col. 1, but shaping the filler would seem an obvious equivalent. United's device falls far below its case of *Goodyear Co.* v. *Ray-O-Vac Co.*, 1944, 321 U.S. 275. It could not be rescued by evidence of even wide commercial acceptance and slavish imitation. We hold, however, that the court should not have determined invalid claims 1-6. This is not because the court did not have power to do so under the pleadings, see *Hap Corporation* v. *Heyman Manf. Co., op. cit. supra,* but because Industrial affirmatively told the court that these

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[5] There is also a suggestion in the testimony that the special advantages of Teflon backed by steel had not been demanded until the recent advent of highly pointed shoes.

[6] The Jorgensen patent was not reproduced in United's record appendix. However, it was introduced by Industrial as an exhibit and, technically, all exhibits are before the court, pursuant to our Rule 22, although, under Rule 23 we have no obligation to examine them unless reproduction has been waived by a court-approved stipulation. *Pioneer Credit Corp.* v. *Bloomberg*, 1 Cir., 1963, 323 F.2d 992. We were led to this exhibit by the file wrapper, also in evidence, although not reproduced.

claims were not in the case. As to them the judgment should be silent.

The third patent, No. 3,061,852, is for a power-operated, automatically activated trimming knife and wiper, designed to cut off the excess, or bunched, material on the toe insole as it is being bedded down. There is nothing novel in the V-shaped, or "bird-mouth" knife, as any asparagus grower would testify. We agree with the district court that this device was within the teaching of the prior art, or at least not notably beyond it. Power activated tandem knives operating in connection with the wipers had been long known. So far as appears, the bunching of the excess over-wiped material on the insole in an area that could be encompassed by a single knife came only with the newly fashionable highly pointed shoes. If there was any substantial earlier demand for this device, there was no evidence of it. Nor do we perceive any special accomplishments in mechanics. Even assuming commercial success and the tribute of imitation (which latter is perhaps debatable) we will affirm the finding of invalidity of the litigated claims of this patent.[7] In so doing we need not pass upon the correctness of the district court's allegedly novel views as to "crowded art." Even if the court may have used, in part, erroneous tests, we feel no enthusiasm for this patent.

Judgment will be entered vacating the judgment of the District Court and remanding the action for further proceedings not inconsistent herewith. Appellant to recover its docket fee and one half of its printing costs in this court.

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[7] Nos. 1, 2, 5 and 6. The findings as to the others should be vacated.

Appendix B

JUDGMENT

July 15, 1964.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the action is remanded to that Court for further proceedings not inconsistent with the opinion filed today; the appellant recovers its docket fee and one half of its printing costs in this Court.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk.

[cc: Messrs. Kirkpatrick and Zallen.]

Appendix C

ORDER OF COURT

August 20, 1964.

It is ordered that the opinion of this Court filed on July 15, 1964, be, and the same hereby is, amended as follows: Page 3, 5th line from the bottom, delete "Industrial." Page 6, line 8, insert "apparently" after "but." Page 6, lines 9-12, delete last full sentence and substitute, "and, when appellee entered this area, it essentially (see fn. 3, supra) followed United rather than the prior machines." Page 6, 2nd line of fn. 3, delete "here."; and further,

It is ordered that the petition for rehearing filed on July 28, 1964, be, and the same hereby is, denied.

By the Court:

ROGER A. STINCHFIELD, *Clerk.*
By: (s) DANA H. GALLUP,
Chief Deputy Clerk.

[cc: Messrs. Kirkpatrick and Zallen.]